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Court of Claims

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the trial court will generally raise the issue sua sponte if the parties do not.²⁵⁸

Indemnity Contracts

One area in which *Dole* has been held inapplicable is where an indemnity agreement exists between the parties. In *Williams v. D. A. H. Construction Corp.*,²⁵⁹ the Appellate Division, Second Department, reversed the trial court's direction of a verdict in favor of the plaintiff and third-party plaintiff, and remanded for a determination of whether the terms of the indemnity contract had been satisfied, *i.e.*, whether the plaintiff's injury was caused by any act or omission by the third-party defendant. The court stated that *Dole* does not apply in this situation.²⁶⁰ It is notable, however, that while the indemnity agreement controls the third-party plaintiff's claim here, *Dole* would have produced the same effect as the terms of the contract.

Court of Claims

The New York State Constitution establishes the Court of Claims as the exclusive forum for claims against the state.²⁶¹ As to claims against all other defendants, however, the court has no competence whatsoever. Because this truncated jurisdiction rules out third-party practice,²⁶² several actions may be necessary to finally resolve a controversy to which the state is a party. This shortcoming of Court of Claims practice has become all the more apparent since *Dole*.²⁶³ When the

²⁵⁸ The Second Department requires the trial court to sua sponte charge the jury with respect to apportionment of fault even absent a crossclaim. *Stein v. Whitehead*, 40 App. Div. 2d 89, 337 N.Y.S.2d 821 (2d Dep't 1972). See also *Lipson v. Gewirtz*, 70 Misc. 2d 599, 602, 334 N.Y.S.2d 662, 665 (Dist. Ct. Nassau County 1972) ("The court on its own initiative is to instruct the jury to fix responsibility among the defendants and apportion damages among those found to be liable.").

²⁵⁹ 42 App. Div. 2d 877, 346 N.Y.S.2d 862 (2d Dep't 1973) (mem.).

²⁶⁰ But see *Schwab*, *supra* note 232, at 160-61, where the author states:

If the intent of *Dole*, inter alia, is to broaden the basis of recovery and to induce otherwise reluctant litigants to contribute towards a settlement, surely the contractual indemnification case law of New York, as recent as it is, accomplishes a contrary result.

²⁶¹ The court has jurisdiction over "claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide." N.Y. CONSR. art. 4, § 9. See generally *McNamara, The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1 (1965); *Jurisdiction of the Court of Claims, Consolidation into the Supreme Court*, in SECOND ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 94 (1957).

²⁶² See *Horoch v. State*, 286 App. Div. 303, 143 N.Y.S.2d 327 (3d Dep't 1955). Trial by jury is not available in the Court of Claims. N.Y. Cr. Cl. Acr § 12(3) (McKinney 1963). Impleader by the state would, therefore, deprive a third-party defendant of a constitutionally guaranteed right. N.Y. CONSR. art 1, § 2.

²⁶³ See *Bartlett v. State*, 40 App. Div. 2d 267, 340 N.Y.S.2d 66 (4th Dep't 1973) (state may not seek a *Dole* apportionment in the Court of Claims).

state is held liable to a claimant in the Court of Claims, the unavailability of impleader requires it to bring a separate action in another court to enforce its right of contribution under *Dole*. As a recent case illustrates, this may go beyond a mere inconvenience to an outright forfeiture of the state's recovery.

In *People v. Delaware and Hudson R.R. Corp.*,²⁶⁴ the state, after paying a judgment rendered against it in the Court of Claims, sought indemnification under *Dole* from a railroad. In the prior action in the Court of Claims,²⁶⁵ the claimant had successfully proved that his injuries were caused by ruts and crumbling pavement at a railroad crossing. In its action for indemnification, the state introduced no evidence of the cause of the accident, apparently relying upon the record in the Court of Claims action to establish the railroad's fault. The trial court's dismissal of the state's case was affirmed by the Appellate Division, Third Department. Since the railroad was not a party to the Court of Claims proceeding, it could not be bound by the judgment rendered therein. Thus the state suffered the loss of its claim because of the impossibility of bringing the railroad into the Court of Claims proceeding.

It has been suggested that the absorption of the Court of Claims into the Supreme Court is "part of the unfinished business of court reform in New York state."²⁶⁶ The existence of a separate court may have been justified in a period when the state's waiver of sovereign immunity was very limited. Then it could be argued that the court dealt in a specialized area. With the advent of virtually complete waiver of immunity, however, claims against the state are no longer subject to special restrictions and should be cognizable in a court of general jurisdiction. The justices of the Supreme Court should be competent to deal with such claims just as they preside over claims against the state's political subdivisions.

Once the need for a separate court disappears, arguments supporting its abolition become even more compelling. As the result in the instant case illustrates, "separate proceedings in separate tribunals . . . can affect both the quality of justice rendered and the ultimate decision of who will pay how much and to whom."²⁶⁷

²⁶⁴ 42 App. Div. 2d 618, 344 N.Y.S.2d 488 (3d Dep't 1973).

²⁶⁵ *Norton v. State*, 19 App. Div. 2d 686 (3d Dep't 1963).

²⁶⁶ 1 WK&M ¶ 101.14.

²⁶⁷ *Jurisdiction of the Court of Claims, Consolidation into the Supreme Court*, in SECOND ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 99 (1957).